In the Supreme Court of the United States

OCTOBER TERM 1978

No. 78-334

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

KENNETH F. FARE,
Acting Chief Probation Officer,

Petitioner,

v.

MICHAEL C.,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI

Petitioner Kenneth F. Fare respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the Supreme Court of the State of California entered in this proceeding on May 30, 1978, reversing a judgment adjudicating respondent to be a ward of the juvenile court and committing him to the California Youth Authority for having committed murder in violation of California Penal Code section 187.

OPINIONS BELOW

The majority, concurring and dissenting opinions of the California Supreme Court, copies of which are set forth as Appendix A to this petition, are reported as *In re Michael C.* (1978) 21 Cal.3d 471, 146 Cal. Rptr. 358, 579 P.2d 7. The opinion of the California Court of Appeal for the Second Appellate District, Division Three, reported and then vacated, which affirmed the order of wardship, appears as Appendix B to this petition.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under Title 28, United States Code, section 1257(3) to review a judgment of the California Supreme Court which was entered on May 30, 1978, and became final on June 29, 1978. The present petition for writ of certiorari is filed within the required 90-day period following entry of final judgment. The instant judgment is a final decision rendered by the highest court of the State of California interpreting rights under the United States Constitution.

QUESTIONS PRESENTED

When a juvenile requests the presence of his probation officer during the course of a custodial interrogation, does the Fifth Amendment as interpreted by *Miranda v. Arizona* (1966) 384 U.S. 436 require the cessation of all further interrogation and the suppression of evidence of statements obtained following denial of the request?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

United States Constitution, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

United States Constitution, Amendment XIV, in relevant part:

> "SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of

life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

. . . "

STATUTES INVOLVED

California Penal Code, Section 187, in relevant part:

"(a) Murder is the unlawful killing of a human being, or a fetus, with malice aforethought.

. . . "

California Penal Code, Section 830.5, in relevant part:

"(a) Any parole officer of the State Department of Corrections, placement or parole officer of the Youth Authority, probation officer, or deputy probation officer is a peace officer. Except as otherwise provided in this subdivision, the authority of any such peace officer shall extend only (1) to conditions of parole or of probation by any person in this state on parole or probation; (2) to the escape of any inmate or ward from a state institution; (3) to the transportation of such persons; and (4) as provided in Section 8597 or 8598 of the Government Code, or when acting pursuant to Section 8617 of the Government Code. The authority of any parole officer of the State Department of Corrections shall further extend to violations of any penal provisions of law which are discovered in the course of and arise in connection with his employment.

. . . "

California Welfare and Institutions Code, Section 602:

> "Any person who is under the age of 18 years when he violates any law of this state or of the United States or any ordinance of any city or county of this state defining crime other than an ordinance establishing a curfew based solely on age, is within the jurisdiction of the juvenile court, which may adjudge such person to be a ward of the court."

California Welfare and Institutions Code, Section 650:

> "(a) A proceeding in the juvenile court to declare a minor a dependent child of the court or a ward of the court under Section 601 is commenced by the filing with the court, by the probation officer, of a petition, in conformity with the requirements of this article.
>
> "(b) A proceeding in the juvenile court to declare a minor a ward under Section 602 of the court is commenced by the filing with the court, by the prosecuting attorney as petitioner, of a petition, in conformity with the requirements of this article."

STATEMENT OF THE CASE

A. Statement of the Proceedings

Respondent is a minor who was committed to the California Youth Authority as a ward of the Superior Court of the State of California in and for the County of Los Angeles on May 10, 1976, following the juvenile court's finding under California Welfare and Institutions Code section 602 that respondent had committed murder

in violation of California Penal Code section 187.

On January 24, 1977, the Court of Appeal of the State of California, Second Appellate District, Division Three, affirmed the judgment in a unanimous opinion. (Appendix B.)

Respondent's application to the California Supreme Court for a hearing was granted, and on May 30, 1978, that court in a divided opinion, reversed the judgment on the ground that the interrogation of respondent following the denial of his request to see his probation officer constituted a violation *per se* of the requirements laid down in *Miranda v. Arizona* (1966) 384 U.S. 436. Petitioner's application for stay of issuance of remittitur and for order deferring the execution and enforcement of judgment was denied by the California Supreme Court on June 29, 1978. Three of the seven justices of the court were of the opinion that the application should have been granted. (Appendix A.)

On July 28, 1978, Mr. Justice Rehnquist ordered enforcement of the judgment of the California Supreme Court stayed pending timely filing and disposition by this Court of a petition for a writ of certiorari.

B. Statement of Facts Adduced at the Juvenile Court Adjudication Hearing

On January 19, 1976, at approximately 9:30 p.m. Helen Yeager arrived at her home located at 8939 Paloma Avenue in Los Angeles County, State of California. She was accompanied by her husband. Mrs. Yeager then left the house for about seven minutes to look for the family dog. As she left, she observed respondent standing across the street from her house. When she returned, she found a trail of blood leading to her husband's dead body, lying in a

pool of blood inside the house. (RT pp. 90-92.)[1] Mr. Yeager was killed by a gunshot wound to the neck. (RT pp. 112-113.)

John Dennis Sheehan, a neighbor of the Yeagers', saw a vehicle with three occupants arrive at the Yeagers' house at approximately 9:30 p.m. on January 19, 1976. (RT pp. 243-248.) Mr. Sheehan then observed Mrs. Yeager leave and subsequently he heard a loud noise (like a bang) coming from the Yeager house. (RT pp. 279-282.)

On February 4, 1976, respondent had a conversation with a Los Angeles police officer at a police station in Van Nuys, California. After advising respondent of his constitutional rights, the interrogating officer continued the conversation as follows:

> Q. . . . Do you understand all of these rights as I have explained them to you?
>
> A. Yeah.
>
> Q. Okay, do you wish to give up your right to remain silent and talk to us about this murder?
>
> A. What murder? I don't know about no murder.
>
> Q. I'll explain to you which one it is if you want to talk to us about it.
>
> A. Yeah, I might talk to you.
>
> Q. Do you want to give up your right to have an attorney present here while we talk about it?
>
> A. Can I have my probation officer here?
>
> Q. Well I can't get a hold of your probation officer right now. You have the right to an attorney.

---

[1] "RT" refers to the "Reporter's Transcript" of the trial court proceedings and which was included as part of the record before the California Supreme Court.

A. How I know you guys won't pull no police officer in and tell me he's an attorney?

Q. Huh?

A. [Repeat of last answer.]

Q. Your probation officer is Mr. Christiansen.

A. Yeah.

Q. Well I'm not going to call Mr. Christiansen tonight. There's a good chance we can talk to him later, but I'm not going to call him right now. If you want to talk to us without an attorney present, you can. If you don't want to, you don't have to. That's your right. You understand that right?

A. Yeah.

Q. Okay, will you talk to us without an attorney present?

A. Yeah I want to talk to you.

(*In re Michael C.* (1978) 21 Cal.3d 471, 473-474, 146 Cal. Rptr. 358, 579 P.2d 7; *see also* RT pp. 355-356; ST pp. 1-2.)[2]

Later during the interrogation, respondent confessed to the offense. (*In re Michael C., supra* at p. 474; ST p. 22.)

Charles P. Christiansen, respondent's probation officer from a previous offense, stated that he had counseled respondent as to family problems and had told respondent to contact him whenever respondent had contact with the police. (RT pp. 371-373.) He never told respondent that he was not supposed to talk to the police. He told respondent that he should not admit openly to an offense

[2]"ST" refers to "Statement Transcript" admitted as Petitioner's Exhibit 18 in the trial court and which was included as part of the record before the California Supreme Court.

without some advice from his parents or a lawyer. (RT pp. 375-376.)

No affirmative defense was presented at the hearing on the factual basis for the petition filed under California Welfare and Institutions Code section 602. (RT p. 409.)

REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

I.

THE CALIFORNIA SUPREME COURT HAS IMPROPERLY INTERPRETED *MIRANDA v. ARIZONA* TO EXCLUDE STATEMENTS OBTAINED FROM A MINOR AFTER HIS REQUEST FOR THE PRESENCE OF HIS PROBATION OFFICER WAS DENIED

A. The *Miranda* Exclusionary Rule Based on the Requirement of Specific Advisements and Waivers of Rights Has Not Been Extended By This Court.

> "Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence." (*Miranda v. Arizona* (1966) 384 U.S. 436, 478.)

When this Court rendered its far-reaching decision in *Miranda v. Arizona, supra,* it did so in the context of a philosophy that while involuntary confessions are constitutionally unacceptable, the admission of a suspect's statement that is the product of his free will is an acceptable and useful tool of law enforcement. As such, the rule announced in *Miranda* attempted a balance

between the community's need for effective enforcement of the criminal law and the individual's rights under the Fifth and Fourteenth Amendments.

The rule of *Miranda*, establishing specific warnings and waivers as a prerequisite to the admission of statements obtained during custodial interrogation, was criticized by the dissenters in that opinion because of its excessive rigidity. Justice Clark warned that: "[s]uch a strict constitutional specific inserted at the nerve center of crime reduction may well kill the patient." (*Miranda v. Arizona, supra,* at pp. 500-501 (Clark, J., dissenting).) In recent years, this Court has ruled that the rigid exclusionary rule established in *Miranda v. Arizona, supra,* is not without exceptions. In *Michigan v. Tucker* (1974) 417 U.S. 333, 446-452, this Court held that not all fruits of a confession obtained in violation of the requirements laid down in *Miranda* would be required to be suppressed where a suspect's confession was obtained prior to the *Miranda* decision but his trial conducted after the decision. In making its holding the Court noted:

> "The [*Miranda*] Court recognized that these procedural safeguards were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected. As the Court remarked:
>
> '[W]e cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted.' "
>
> (Citations omitted.) (*Michigan v. Tucker, supra,* at p. 444.)

This Court has also held that the invocation by a suspect of his Fifth Amendment right as to one charge does not

necessarily require exclusion of a confession obtained after a reiteration of *Miranda* rights at a later time on a different charge. (*Michigan v. Mosley* (1975) 423 U.S. 96, 104-107.)

In *Harris v. New York* (1970) 401 U.S. 222, 225-226, a statement obtained in violation of a suspect's *Miranda* rights was held admissible to impeach a testifying defendant, and in *Oregon v. Hass* (1975) 420 U.S. 714, 719, the Court held admissible for impeachment purposes a statement made by defendant even though the defendant had previously exercised his *Miranda* rights by requesting to speak to his attorney.

It is noteworthy that while the Court has made exceptions to the exclusionary rule imposed by *Miranda*, the Court has in no case expanded the number of advisements and waivers originally required by *Miranda*. Nor has the Court ever indicated that a request for any person other than an attorney would constitute an invocation of the right against self-incrimination which would preclude the admission into evidence of any statements made thereafter.[3]

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[3]The continuing validity of the strict exclusionary rule under *Miranda* has come into question. (*See e.g., Brewer v. Williams* (1978) 430 U.S. 387, 420-429 (Berger, C.J., dissenting).)

B. The California Supreme Court Impermissibly Attempted to Expand the Requirements of *Miranda v. Arizona, supra,* by Holding That a Minor Suspect's Request for His Probation Officer Constituted *Per Se* an Invocation of the Right to Silence Requiring the Cessation of Further Interrogation.

A State may not as a matter of federal constitutional law impose greater *Miranda* restrictions when this Court specifically refrains from imposing them. (*Oregon v. Hass, supra,* (1975) 420 U.S. 714, 719.) In the instant case the California Supreme Court has given an unnecessarily expansive reading to *Miranda* by ruling inadmissible statements obtained from a minor following denial of his request to see his probation officer. Petitioner submits that where, as here, a state court reads *Miranda* too broadly, it is appropriate for this Court to grant a writ of certiorari in order to insure that the rule adopted in *Miranda* is confined to the express terms and logic of the original opinion, and that *Miranda* is not cut "loose from its own explicitly stated rationale." (*Beckwith v. United States* (1976) 425 U.S. 341, 345; *see also Oregon v. Mathiason* (1977) 429 U.S. 492, 493-496.)

In defining the specific advisements and waivers required to be taken prior to the commencement of custodial interrogation, this Court in *Miranda* included the right to consult with counsel prior to questioning and also the right to have counsel present during the interrogation. (*Miranda v. Arizona, supra,* at 469-470.) The Court noted that "circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators" (*Id.* at 469), and held therefore that the right to the presence of counsel at the interrogation was indispensable to the

protection of a defendant's Fifth Amendment privilege against self-incrimination. The Court further noted that at the interrogation counsel could mitigate the danger of untrustworthiness in statements provided, help to reduce the likelihood of police coercion, and witness any coercion that might take place. The presence of counsel would also help to guarantee that the statement given to the police would be accurate and correctly reported. (*Id.*) While the requirement of the right to counsel under *Miranda* has been characterized as based on the Fifth Amendment, there can be no question that counsel was singled out by the Court because of the importance of the role of counsel under the Sixth Amendment. (*See Miranda v. Arizona, supra,* at pp. 513-514 (Harlan, J., dissenting).)

In the instant case, respondent's interrogation and ultimate confession was preceded by advisement and waiver of all *Miranda* rights, including the right to counsel. Under such facts, petitioner submits that the proper rule for judging the admissibility of respondent's confession is whether, considering the totality of the circumstances, the free will of the minor was overborne. (*United States v. Washington* (1977) 431 U.S. 181, 188; *Morales v. New York* (1969) 396 U.S. 102, 104.) In the instant case, the California Supreme Court specifically rejected the totality of circumstances doctrine and held that a request by a minor for his probation officer *per se* invokes the right to silence. (*In re Michael C., supra,* at p. 477.)

Petitioner submits that the *per se* exclusionary rule adopted by the California Supreme Court is inconsistent with the intents and purposes of *Miranda* and that it unreasonably hampers law enforcement and the probation office in their investigative efforts. The requirement of

Miranda that a suspect be accorded the right to counsel prior to and during an interrogation is based on the special role that counsel and no other person has in the judicial process, namely, to protect the interest of the accused against the interest of any other party. Rules of professional conduct and ethics are designed to ensure that counsel is unhampered by any conflict of interest from vigorously defending the rights of his client. A probation officer, by contrast, has no such singular duty. As Justice Mosk stated in his concurring opinion in *In re Michael C., supra,* at p. 478:

> "[T]he majority concede, as they must, that the probation officer serves as a peace officer ([Cal.] Pen. Code § 830.5) and has the duty to file charges against a minor ([Cal.] Welf. & Inst. Code § 650), including those arising from the instant circumstances. Thus, regardless of the healthy rapport which may have developed between this arrestee and his probation officer, duties of the latter compel him to render reasonable assistance to his fellow peace officers."

It is clear that the majority in *In re Michael C., supra,* at p. 477, incorrectly concluded: (1) that "Consultation with a probation officer thus acts as a 'protective [device] . . . to dispel the compulsion inherent in custodial surroundings.' (*Miranda v. Arizona, supra,* (1966) 384 U.S. 436, 458) . . ." and (2) that by requesting to see his probation officer the minor no less invoked the protection against self-incrimination than if he had asked for the presence of an attorney.

In the instant case when respondent requested to see his probation officer, he was told by the interrogating officer that the probation officer could not be reached at that time

but that respondent had a right to an attorney. The minor was told there was a good chance he could talk to his probation officer later but that the probation officer would not be called at that time. The minor was then readvised of his right to have an attorney present and his right to remain silent. Respondent indicated he understood his rights and stated that he wished to speak to the police officer. The totality of the above circumstances indicates clearly that respondent's free will was in no way overborne by the police prior to his confession, (*United States v. Washington, supra,* (1977) 431 U.S. 181, 188), and that the juvenile court acted properly in overruling respondent's *Miranda* objections. The creation by the California Supreme Court of a new *per se* exclusionary rule constituted a radical departure from the otherwise specific procedural requirements outlined in *Miranda*.

Such a departure from the precise requirements of the *Miranda* opinion will serve to generate confusion as to what constitutes a proper waiver of rights during custodial interrogation. Petitioner submits that the California Supreme Court's impermissible expansion of the requirements of *Miranda v. Arizona* requires review by this Court.

II.

THE OPINION BELOW IS BASED EXCLUSIVELY ON FEDERAL CONSTITUTIONAL AUTHORITY

The instant decision of the California Supreme Court was based solely on an interpretation of the Federal Constitution and *Miranda v. Arizona, supra.* There are no references to state statutory or constitutional grounds. (*In re Michael C., supra,* (1978) 21 Cal.3d 471, 473-478, 146 Cal. Rptr. 358, 579 P.2d 7.) The state cases

principally relied on by the California Supreme Court were also interpretations of *Miranda* or of the Federal Constitution. (*See People v. Burton* (1971) 6 Cal.3d 375, 99 Cal. Rptr. 1, 491 P.2d 793; *People v. Randall* (1970) 1 Cal.3d 948, 83 Cal. Rptr. 658, 464 P.2d 114; *People v. Ireland* (1969) 70 Cal.2d 522, 75 Cal. Rptr. 188, 450 P.2d 580; *People v. Fioritto* (1968) 68 Cal.2d 714, 68 Cal. Rptr. 817, 441 P.2d 625.)

While the California Supreme Court discussed the role of probation officers in California (*In re Michael C., supra,* at p. 476), the decision to exclude statements made following the denial of a request for a probation officer is not based on any unique status afforded probation officers by California law. Rather, the California Supreme Court based its holding on the Fifth Amendment right to silence and privilege against self-incrimination as defined in *Miranda*. Relying on the *Miranda* court's holding regarding requests for an attorney, the decision below holds that, under federal constitutional principles, a juvenile's request for a probation officer is *per se* the same as a request for counsel. (*Id.* at p. 477.)

For the foregoing reasons, petitioner submits that the opinion below is based exclusively on federal constitutional authority and is properly the subject of review by this Court on writ of certiorari.

CONCLUSION

For the foregoing reasons petitioner submits that a writ of certiorari should issue to review the decision of the California Supreme Court.

Respectfully submitted,

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APPENDIX

Appendix A

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re MICHAEL C., a Person Coming Under the Juvenile Court Law.

KENNETH F. FARE, as Acting Chief Probation Officer, etc.,

Plaintiff and Respondent,

v.

MICHAEL C.,

Defendant and Appellant.

CRIM. 19921
Super. Ct. No. 466633

Defendant Michael C., a 16-year-old minor, appeals from juvenile court orders sustaining allegations that he comes within Welfare and Institutions Code section 602 for having killed Robert Yeager (Pen. Code, § 187), adjudicating him to be a ward of the court, and committing him to the Youth Authority. We concur in defendant's contention that his confession was obtained in violation of the rules announced in Miranda v. Arizona (1966) 384 U.S. 436 and subsequent cases, and that its admission into evidence constituted reversible error.

On February 4, 1976, police interrogated defendant at the Van Nuys police station. After advising defendant of his *Miranda* rights, the police interrogating officer continued the conversation as follows:

"Q. . . . Do you understand all of these rights as I have explained them to you?

"A. Yeah.

"Q. Okay, do you wish to give up your right to remain silent and talk to us about this murder?

"A. What murder? I don't know about no murder.

"Q. I'll explain to you which one it is if you want to talk to us about it.

"A. Yeah, I might talk to you.

"Q. Do you want to give up your right to have an attorney present here while we talk about it?

"A. *Can I have my probation officer here?*

"Q. Well I can't get a hold of your probation officer right now. You have the right to an attorney.

"A. How I know you guys won't pull no police officer in and tell me he's an attorney?

"Q. Huh?

"A. [Repeat of last answer.]

"Q. Your probation officer is Mr. Christiansen.

"A. Yeah.

"Q. Well I'm not going to call Mr. Christiansen tonight. There's a good chance we can talk to him later, but I'm not going to call him right now. If you want to talk to us without an attorney present, you can. If you don't want to, you don't have to. But if you want to say something, you can, and if you don't want to say something you don't have to. That's your right. You understand that right?

"A. Yeah.

"Q. Okay, will you talk to us without an attorney present?

"A. Yeah I want to talk to you." (Emphasis added.)

Later during the interrogation, defendant confessed.

We shall point out that under the rules established in Miranda v. Arizona, *supra*, and further elaborated in this state in People v. Burton (1971) 6 Cal.3d 375, the police unlawfully obtained defendant's confession. Defendant's request to see his probation officer at the commencement of interrogation negated any possible willingness on his part to discuss his case with the police; it thereby invoked his Fifth Amendment privilege.

Noting that an environment of incommunicado police-dominated interrogation "is created for no purpose other than to subjugate the individual to the will of his examiner," the United States Supreme Court in *Miranda*, concluded that "without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." (Miranda v. Arizona, *supra*, 384 U.S. 436, 457, 467.) The Supreme Court in *Miranda* set down four warnings which must be given to persons in "custodial surroundings," and then specified the protections that must be afforded after the rendition of such warnings: "If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. [Fn. omitted.] At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. . . . If the individual states that he wants an attorney, the interrogation must cease until an attorney is present." (Miranda v. Arizona, *supra*, 384 U.S. 436, 473-474.)

Recognizing that the suspect may not expressly state that he wants an attorney, we have held in previous cases that any conduct which "reasonably appears inconsistent with a present willingness on the part of the suspect to discuss his case freely and completely with police *at that time*" amounts to an invocation of the Fifth Amendment privilege. (People v. Randall (1970) 1 Cal.3d 948, 956.) We have variously held that a suspect's refusal to sign a waiver of his constitutional rights, a suspect's statement, "Call my parents for my attorney," and a suspect's telephone call to his attorney, in and of themselves each invokes the Fifth Amendment privilege. (People v. Fioritto (1968) 68 Cal.2d 714; People v. Ireland (1969) 70 Cal.2d 522; People v. Randall, *supra*, 1 Cal.3d 948.)

In this case we must decide whether a minor's request for his probation officer's presence "reasonably appears inconsistent with a present willingness" concurrently to "discuss his case freely and completely with police. . . ." (People v. Randall, *supra*, 1 Cal.3d 948, 956.) In People v. Burton, *supra*, 6 Cal.3d 375, we held that a minor's request to consult his parents invoked the minor's Fifth Amendment privilege. As we stated there: "It would certainly severely restrict the 'protective devices' required by *Miranda* in cases where the suspects are minors if the only call for help which is to be deemed an invocation of the privilege is the call for an attorney. It is fatuous to assume that a minor in custody will be in a position to call an attorney for assistance and it is unrealistic to attribute no significance to his call for help from the only person to whom he normally looks—a parent or guardian. It is common knowledge that this is the normal reaction of a youthful suspect who finds himself in trouble with the law." (People v. Burton, *supra*, 6 Cal.3d 375, 382.)

In view of the emphasis which the juvenile court system places upon the close relationship between a minor and his probation officer,[1] and in light of the probation officer's instructions in the present case that his ward contact him immediately in case of trouble,[2] the "normal reaction" of the minor here would be to request consultation with his probation officer. Fearing that the police would take advantage of his ignorance,[3] Michael wanted and needed the advice of someone whom he knew and trusted. He therefore asked for his probation officer—a personal advisor who would understand his problems and needs and on whose advice the minor could rely. By analogy to *Burton*, we hold that the minor's request for his probation officer — essentially a "call for help" — indicated that the minor intended to assert his Fifth Amendment privilege. By so holding, we recognize the role of the probation officer as a trusted guardian figure who exercises the authority of the state as *parens patriae* and whose duty it is to implement the protective and rehabilitative powers of the juvenile court.

The Attorney General contends, however, that the request here for a probation officer can be distinguished

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[1]See Bryan v. Superior Court (1972) 7 Cal.3d 575, 587; In re Gladys R. (1970) 1 Cal.3d 855, 860, footnote 7.

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[2]The probation officer testified at trial that he had "instructed Michael that at any time he has a police contact, even if they stop him and talk to him on the street, he is to contact me immediately," reasoning that "many times the kids don't understand what is going on, and what they are supposed to do relative to police . . . ."

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[3]Clearly defendant's fear that the police would bring in a police officer under the pretext of providing Michael with an attorney was real enough. As the interrogating officer said to Michael later in the interview, "Well we don't always play fair, do we?"

from the request in *Burton,* for, instead of affording the counsel and protection of a parent, the probation officer represents an "arm of the prosecutorial system." That the probation officer serves as a peace officer (Pen. Code, § 830.5) and has been charged with the duty to file a petition alleging that a minor committed the claimed offense (Welf. & Inst. Code, § 650), however, does not alter the fact that the probation officer is frequently the person to whom a minor might turn for help on such matters as to whether or not he should obtain an attorney. When Michael C. asked to see his probation officer, he was not seeking to confide in a prosecutor.

The People assert that once we extend our holding in *Burton* to include a request to see a probation officer, we cannot reasonably distinguish a request for consultation with one's football coach, music teacher or clergyman. The request for the probation officer, however, is entirely distinguishable; the probation officer is an official appointed pursuant to legislative enactment "to represent the interests" of the juvenile (Welf. & Inst. Code, § 280). Since the inception of the juvenile court system the probation officer has borne the duty to advise and care for the juvenile defendant. Consultation with a probation officer thus acts as a "protective [device] . . . to dispel the compulsion inherent in custodial surroundings" (Miranda v. Arizona, *supra,* 384 U.S. 436, 458) precisely because the probation officer is particularly well-suited to provide the minor suspect with "help in how to conduct himself with police" (People v. Burton, *supra,* 6 Cal.3d 375, 383).

The People further rely on People v. Lara (1967) 67 Cal.2d 365, and In re Dennis M. (1969) 70 Cal.2d 444, cases in which we held that the "totality of the circumstances" governed whether a juvenile had the capacity to understand the meaning of the warnings given him, and

knowingly and intelligently to waive his *Miranda* rights. In the present case, the People argue that Michael C. is an "older juvenile" who has had previous experience with the police. Contending that nothing in the record suggests that the police coerced Michael by their questioning, the People thus conclude that, based on the totality of circumstances, the trial court properly ruled that Michael's confession was voluntary.

In cases in which we must decide whether a confession is voluntary or coerced we have looked to the "totality of the circumstances" to find whether the confessant was capable of understanding the interrogation and voluntarily confessed or whether his will was actually overcome. Here, however, we face conduct which, regardless of considerations of capacity, coercion or voluntariness, per se invokes the privilege against self-incrimination. Thus our question turns not on whether the defendant had the ability, capacity or willingness to give a knowledgeable waiver, and hence whether he acted voluntarily, but whether, when he called for his probation officer, he exercised his Fifth Amendment privilege. We hold that in doing so he no less invoked the protection against self-incrimination than if he asked for the presence of an attorney.

Finally, in People v. Randall, *supra,* 1 Cal.3d 948, 957, we held that the People bear the burden of demonstrating "that a questioned confession meets the constitutional tests of admissibility." Similarly in *Burton* we placed the burden on the People to show that a request by a minor to see his parents "is not an indication of that minor's unwillingness to continue talking with police or of a desire for help in how to conduct himself with police. . . ." (People v. Burton, *supra,* 6 Cal.3d 375, 383.) Accordingly, we

hold here that the People must meet the burden of proving that a minor who requests to see his probation officer does not intend to assert his Fifth Amendment privilage. In the instant case, the People did not meet that burden.[4]

Because the police did not cease custodial interrogation immediately upon defendant's exercise of his Fifth Amendment privilage, the trial court should not have admitted the confession which was obtained by subsequent questioning. The admission of such confession was prejudicial per se and compels reversal of the orders. (People v. Burton, *supra,* 6 Cal.3d 375, 384; People v. Randall, *supra,* 1 Cal.3d 948, 958.)

The judgment is reversed.

TOBRINER, J.

We concur:

MOSK, J.

RICHARDSON, J.

NEWMAN, J.

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[4]The dissent suggests that although it is clear in the present case that defendant requested to see his probation officer out of a desire for help in how to conduct himself with the police (cf. People v. Burton, *supra*, 6 Cal.3d at p. 383), we should not find that such a request invoked defendant's Fifth Amendment rights. The dissent apparently argues that no invocation of Fifth Amendment rights occurred, because once defendant's request was denied, defendant was willing to continue the interrogation with the police. Under such an analysis, of course, the police could ignore a defendant's request for an attorney and still argue that any subsequent confession was properly obtained, since the defendant was "willing" to continue the interrogation in the absence of his attorney. The dissent's approach flies directly in the face of *Miranda*, which as we have noted, explicitly holds that "[i]f the individual states that he wants an attorney, the interrogation must cease until an attorney is present." (384 U.S. at p. 474. See also People v. Burton, *supra*, 6 Cal.3d at p. 384.)

CONCURRING OPINION BY MOSK, J.

While under these facts I must concur in the majority opinion, I have serious reservations about the ultimate result.

The majority concede, as they must, that the probation officer serves as a peace officer (Pen. Code, § 830.5) and has the duty to file charges against a minor (Welf. & Inst. Code, § 650), including those arising from the instant circumstances. Thus, regardless of the healthy rapport which may have developed between this arrestee and his probation officer, duties of the latter compel him to render reasonable assistance to his fellow peace officers.

If this minor had contacted his attorney, or his parents (People v. Burton (1971) 6 Cal.3d 375), either or both might have advised him to remain silent, that his legal prospects would be enhanced by aloofness rather than cooperation, that the burden of proving the case against him should not be eased by voluntary disclosures.

May a probation officer, a statutory peace officer, properly give that kind of advice, even if he believes it to be in the best interests of the minor? I doubt it. Consistent with his public responsibilities, the probation officer must counsel his charge to be cooperative and to help solve the crime, even if by doing so the minor implicates himself in a serious felony.

Thus I am concerned that ultimately the minor will not benefit by deeming his probation officer to be a surrogate attorney or parent, a role that the officer cannot objectively assume. Where a conflict between the minor and the law arises, the probation officer can be neither neutral nor in the minor's corner.

Still another potential problem looms on the horizon. When the probation officer, a statutory peace officer,

advises the minor to cooperate with the police, perhaps even to confess, the minor is likely to complain later of what he will perceive as pervasive law enforcement pressure. He may argue, with some rationality, that he had been subjected to a variation of the Mutt-and-Jeff technique criticized in *Miranda*: initial interrogating by overbearing officers, then comforting by a presumably friendly and gentle peace officer in the guise of a probation officer. (Miranda v. Arizona (1966) 384 U.S. 436, 452.) The bottom line is that pursuant to the technique he will have submitted to interrogation. When that argument is made to us, as it inevitably will be one day, we will face a difficult problem.

With all my misgivings, however, I agree with the majority that the People have not meet the burden imposed by People v. Randall (1970) 1 Cal.3d 948, 957, of establishing that the "questioned confession meets the constitutional tests of admissibility."

MOSK, J.

I concur:

BIRD, C.J.

DISSENTING OPINION BY CLARK, J.

The question presented is whether the People carried their burden of proving that defendant did not intend to assert his privilege against self-incrimination when he asked to see his probation officer. Reviewing this question in light of the totality of circumstances shown by the record, I, like the trial court and the unanimous Court of Appeal, conclude that the People did carry their burden. Accordingly, I would affirm the judgment.

Because of confusion created by the majority, it is necessary to emphasize that this question is one of fact to be decided in light of the *totality of circumstances shown by the record.*

On the one hand, the majority appear to hold that defendant's request for his probation officer constituted, per se, an invocation of his Fifth Amendment privilege, foreclosing consideration of the "totality of the circumstances" to determine whether his request was actually intended as such an invocation. "In cases in which we must decide whether a confession is voluntary or coerced we have looked to the 'totality of the circumstances' to find whether the confessant was capable of understanding the interrogation and voluntarily confessed or whether his will was actually overcome. Here, however, we face conduct which, regardless of considerations of capacity, coercion or voluntariness, per se invokes the privilege against self-incrimination." (*Ante,* p. 477.)

On the other hand, in the succeeding paragraph the majority appear to recognize that our inquiry into whether defendant asserted his Fifth Amendment privilege is not concluded when we find, what is not disputed, that he asked for his probation officer, but that we must proceed to

inquire whether his request was meant as an assertion of the privilege. "[W]e hold here that the People must meet the burden of proving that a minor who requests to see his probation officer does not intend to assert his Fifth Amendment privilege." (*Ante,* pp. 477-478.) This recognition of the People's right to assume that burden is compelled by People v. Burton (1971) 6 Cal.3d 375. "[W]e hold that when, as in the instant case, a minor is taken into custody and is subjected to interrogation, without the presence of an attorney, his request to see one of his parents, made at any time prior to or during questioning, must, *in the absence of evidence demanding a contrary conclusion,* be construed to indicate that the minor suspect desires to invoke his Fifth Amendment privilege." (*Id.* at pp. 383-384, italics added.)

What term of art applies to the evidence bearing on the question whether defendant intended to assert his privilege against self-incrimination when he asked for his probation officer? The term that comes to mind is the "totality of the circumstances" shown by the record. However, quibbles over terminology are of little moment so long as it is clearly understood that one must consider the circumstances — the "context," if you prefer — of defendant's request in order to determine its significance.

The question whether defendant's request for his probation officer manifested an unwillingness to proceed with the interrogation in his absence is readily resolved by simply reading the succeeding portion of the transcript. After being informed that his probation officer would not then be summoned, defendant was again advised of his right to remain silent and again asked if he understood that right. Replying that he did understand it, defendant

reiterated his willingness to continue the interrogation. (*Ante,* pp. 473-474.)

Recognizing that it is a question of fact whether defendant intended to assert his privilege against self-incrimination by requesting his probation officer, the distinguished trial judge[1] concluded that the record clearly indicated that defendant was willing to proceed with the interrogation in the absence of his probation officer. Affirming the judgment, the Court of Appeal unanimously concluded that "the 'totality of the circumstances' affords sufficient 'affirmative proof' of an intent to waive the privilege." After independently reviewing the record I reach the same conclusion and lament the fact that the majority free a confessed murderer.[2]

CLARK, J.

I concur:
MANUEL, J.

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[1]That Judge Bonnie Lee Martin is the author of one of the most widely used handbooks on search and seizure issues is but one indication of her scholarship and sensitivity to the constitutional issues present in situations involving the admissibility of evidence. (See Martin, Comprehensive California Search and Seizure (1971).)

[2]The Court of Appeal observed that without the confession the balance of the evidence is insufficient to sustain the conviction.

Appendix B

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

In the Matter of MICHAEL WAYNE C.,

a Person Coming Under the Juvenile Court Law,

Appellant,

v.

KENNETH F. FARE, as Acting Chief Probation Officer,

Petitioner and Respondent.

2d Crim. No. 29273
Sup.Ct.Juv. No. 466633

Michael Wayne C., a 16 year old minor, appeals from orders of the juvenile court made April 12 and May 10, 1976, sustaining the allegations of paragraph I of a petition filed by the county probation officer alleging Michael to be a person who came within the provisions of Welfare and Institutions Code section 602 for having killed one Robert Yeager in violation of Penal Code section 187 and adjudicating him to be a ward of the court and committing him to the Youth Authority. The appeal lies. (Welf. & Inst. Code, § 800.)

Contentions

It is contended that his confession, obtained in violation of Fifth Amendment constitutional rights should have been excluded dictating reversal of the orders. (*People v.*

Fioritto, 68 Cal.2d 714, 720.)[1]

Discussion

It is argued that, by requesting the presence of his probation officer at the time of interrogation by police sergeant Stanley L. Miller, the minor invoked his privilege against self-incrimination rendering the confession thereafter obtained invalid. In this respect Sergeant Miller testified:

"BY MR. LEVITIN: [For People]

Q. Sergeant Miller, during the course of your investigation, did you have a conversation with defendant Michael C . . . . ?

A. Yes, sir.

Q. And when and where did that conversation take place?

A. That occurred on February 4, 1976, at Van Nuys Police Station.

Q. During the course of that conversation, before initiating the conversation, did you advise defendant C . . . of his constitutional rights?

A. Yes, sir.

Q. What did you tell him in that regard?

A. I advised defendant C . . . from a card, L.A.P.D. Form 15.30.

Q. Did you read that card to him?

A. Yes, sir, I did.

Q. Would you read it to us now in the same manner that you read it to him?

A. I advised Michael C . . . :

'You have the right to remain silent. If you give up the right to remain silent, anything you say

[1] It appears that absent the confession the evidence was insufficient to sustain the conviction. No argument to the contrary is presented by the People.

can and will be used against you in a court of law.

'You have the right to speak with an attorney and to have the attorney present during questioning.

'If you so desire and cannot afford one, an attorney will be appointed for you without charge before questioning.'

I asked Michael C . . . 'Do you understand each of these rights as I have explained them to you,' and he stated, 'Yeah.'

I said, 'Do you wish to give up your rights to remain silent,' and he said, 'Yes.'

I said, 'Do you wish to give up your right to an attorney, have him present?'

At that time, he asked if he could speak to his probation officer. I advised him he had a right to have an attorney present. I would not call his probation officer, and he stated he would talk to me without an attorney at that point.

Q. All right, now, were there any other persons besides yourself and defendant C . . . present during this conversation?

A. Yes, Investigator Steinauer.

Q. And this conversation took place at the Van Nuys Police Station, one of the interview rooms?

A. Yes, sir.

Q. And was that conversation recorded?

A. Yes, sir.

Q. And did you cause or procure a transcript to be prepared of that recording?

A. Yes, sir.

Q. And have you reviewed the transcript and the recording?

A. Yes, sir.

Q. And is the transcript a true and correct copy of the recording, insofar as you are able to tell?

A. Yes, Sir.

MR. LEVITIN: I'd like to have marked as People's next in order, People's —

THE COURT: 16, Petitioner's 16.

MR. LEVITIN: — this transcript of Michael C . . . bears the tape number 61725."

Then the following occurred:

MISS RICE: Your Honor, there are some additions that I believe the district attorney would agree to that are not contained in the transcript. Perhaps we should give them to the court at this time.

Line — On page 2, line 4, transcript reads: 'Yeah, I want to talk to you.' Should read, 'Yeah, I might talk to you.'

THE COURT: All right, may we correct by interlineation?

MR. LEVITIN: Petitioner so stipulates.

THE COURT: 'Yeah, I might talk to you.'

MISS RICE: Line 10 —

MR. LEVITIN: What page?

MISS RICE: This is page 2. 'How I know you guys won't pull no police officer in and tell me he is an attorney?'

MR. LEVITIN: So stipulated.

THE COURT: Will be amended by interlineation on line 10, page 2, to read: 'How I know you guys won't pull no police officer in and tell me he is an attorney?'

MISS RICE: Yes. Line 1 is then a repeat of line 10.

Your Honor, there may be one or two words different in the repeat, but it's in substance a repeat.

Line 13, 'Your probation officer is Mr. Christianson.' Line 15, 'Well, I am not going to call' — the word 'him' is not on the tape. It is really, 'Well, I am not going to call Mr. Christianson.'

Line 24, 'Yeah, I want to talk to you.'

MR. LEVITIN: In other words, the lead-in words are unintelligible, and the 'I want to' —

THE COURT: Those changes have been made by the court by interlineation.

MISS RICE: We began at page 3, line 3.

THE COURT: And it goes to what?

MISS RICE: Goes to line 11 or 13, I am not sure what I indicated to the court. I stopped at line 11.

THE COURT: And then as to page 14, this is simply going to be a stipulation rather than listening to the tape, line 13 through 16.

MISS RICE: Your Honor, 'Hey, man,' something unintelligible, 'Tell nobody what I have been telling you, man.' The questioner would be the investigator — something unintelligible, 'No way, no way,' and then, 'I am going to get my coffee.'

THE COURT: All right. Does that complete the preliminary matters on foundation as far as the petitioner's concerned, Mr. Levitin, or do you have anything additional you want to ask Sergeant Miller concerning foundation for C . . .'s statement?

MR. LEVITIN: That's all petitioner offers with regard to the foundational regard to C . . . . "[2]

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[2]The clerk's transcript indicates that the transcript of tape no. 61725 (defendant) Exh. No. 16 and the tape itself Exh. No. 17 were marked for identification only on April 9, 1976, and that on April 12 Exh. 17 was received in evidence. The reporter's transcript shows that the transcript was "marked" as Exh. 16. The index fails to disclose that either 16 or 17 were ever received in evidence. The trial court expressly referred to the transcript in ruling on the motion to exclude the confession.

In denying the motion to exclude the confession the trial court summarized the situation by saying:

"THE COURT: I think it is a factual question in each case as to whether the minor is indicating that he does not want to give up his right to remain silent or just what the purpose of the statement is.

I point out at page 2 of the transcript that prior to asking, 'Can I have my attorney or my probation officer here,'[3] the minor does state, 'Yeah, I might talk to you.' It seems to me that the statement both before and after the question whether he can have his probation officer here indicates pretty clearly that the minor is willing to talk without the probation officer or without the attorney.

Sergeant Miller apparently has gone on to — after the question, 'Can I have my probation officer here,' he has gone on again to re-explain the right, 'If you don't want to talk to us, you don't have to. If you don't want to say something, if you want to say something, you can. If you don't want to say something, you don't have to. That's

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[3]Here the court's quotation of the minor's question from the transcript is both improper and inaccurate, improper because the transcript was not in evidence and inaccurate because the minor did not in fact request presence of an attorney. At no place in the record before us is it disclosed that the minor ever asked for an attorney nor does he so contend on appeal. The court correctly quoted the minor's question in the next paragraph as "Can I have my probation officer here." We too have gone outside the record out of an abundance of caution in view of the confusion created by the record as presented on appeal in this case and the obvious assumption by all concerned that the transcript, which had been marked for identification was in fact in evidence.

your right. Do you understand?'

The minor says, 'Yes.' He explains that, 'We can talk to the probation officer later, but I am not going to call him right now,' and it seems to me we are dealing here with a 16, 16 and a half year old minor who has been through the court system before, has been to camp, has a probation officer. We are not dealing with a young, naive minor with no experience with the courts. I just do not construe it in this case as an indication of the privilege.

In Burton, as you recall, the parent was present in the police station and had requested to see the minor, and the minor had several times requested to see the parents, and while they don't set forth the conversation or the interrogation that occurred in Burton, one certainly gets the impression from reading the decision that the minor was just kind of worn down. I don't see that in this case at all. The statement, 'Can I have my probation officer present,' occurs right at the outside of the conversation. There is no evidence of any lengthy prior interrogation or anywhere keep having to — or they keep pursuing a substantive offense prior to a waiver of a right. It seems to me there is a clear waiver at the outset in this case.

The court denies the motion to exclude the conversation."

Although it is subsequently argued that threats and promises by the police and the invocation of the right to silence invalidated the confession,[4] we must conclude that there was a knowing and intelligent waiver of the minor's

[4]These matters were resolved as factual matters adversely to the position taken on appeal. The trial court's findings in this respect are supported by the record before us and are binding on appeal. (*People v. Duren*, 9 Cal.3d 218, 238.)

Miranda[5] rights unless it can be said that the request to speak to a probation officer was in and of itself sufficient to invoke his privilege against self-incrimination guaranteed by the Fifth Amendment.

In *People v. Burton*, 6 Cal.3d 375, a 16 year old minor was arrested, taken to the police station, booked and placed in a cell for questioning at which time he requested to see his parents (his father had arrived during the booking process but had been refused a request to see his son). Subsequently the minor was advised of his *Miranda* rights which he waived and then confessed to the crime. Concluding that the People had presented no proof that the minor did not intend to assert his privilege, the Supreme Court held at pages 383-384 that: "[W]hen, as in the instant case, a minor is taken into custody and is subjected to interrogation, without the presence of an attorney, his request to see one of his parents, made at any time prior to or during questioning, must, in the absence of evidence demanding a contrary conclusion, be construed to indicate that the minor suspect desires to invoke his Fifth Amendment privilege. The police must cease custodial interrogation immediately upon exercise of the privilege. The police did not so cease in this case, the confession obtained by the subsequent questioning was inadmissible, and, therefore, the admission of such confession was prejudicial per se and compels reversal of the judgment on all counts. (*People v. Randall, supra,* 1 Cal.3d 948, 958; and cases there cited.) The admission of this confession constitutes reversible error even though it was subsequently preceded by a knowing and intelligent waiver of the privilege, as we

[5]*Miranda v. Arizona*, 384 U.S. 436 [16 L.Ed.2d 694, 86 S.Ct. 1602].

held under identical circumstances in *Fioritto, Ireland* and *Randall*, because: 'After the initial assertion of the privilege, the defendant is entitled to be free of police-initiated attempts to interrogate him. Any statements made by a defendant in response to such questioning cannot be characterized as voluntary.' (*People v. Randall, supra,* 1 Cal.3d 948, 958.)"

It is suggested that the holding in *Burton* be extended by this court to include a request to see his probation officer. This we decline to do.

While such an extension might, at first blush, appear logical, we believe a line must be drawn before a request for consultation with one's football coach, music teacher or clergyman, be deemed to invoke Fifth Amendment privileges. While we would draw the line even though there was "nothing in the way of affirmative proof that defendant did not intend to assert his privilege", *Burton, supra,* page 383, we find in the record before us the existence of a measure of such proof sufficient to factually distinguish *Burton* and support the lower court's action in so doing. Noting that *Burton* does not discuss *People v. Lara,* 67 Cal.2d 365 (cert. denied, 392 U.S. 945) we believe the following from that opinion is instructive:

"We cannot accept the suggestion of certain commentators (see 7 Santa Clara Lawyer 114, 127 (1966); 40 Wash.L.Rev. 189, 200-201 (1965)) that every minor is incompetent as a matter of law to waive his constitutional rights to remain silent and to an attorney unless the waiver is consented to by an attorney or by a parent or guardian who has himself been advised of the minor's rights. Such adult consent is of course to be desired, and should be obtained whenever feasible. But as we will explain, whether a minor knowingly and intelligently waived these

rights is a question of fact; and a mere failure of the authorities to seek the additional consent of an adult cannot be held to outweigh, in any given instance, an evidentially supported finding that such a waiver was actually made."

"This, then, is the general rule: a minor has the capacity to make a voluntary confession, even of capital offenses, without the presence or consent of counsel or other responsible adult, and the admissibility of such a confession depends not on his age alone but on a combination of that factor with such other circumstances as his intelligence, education, experience, and ability to comprehend the meaning and effect of his statement. (See cases collected in Note, 87 A.L.R.2d 624.) Applying the 'totality of circumstances' test of *Gallegos*, such confessions have been held admissible when made by a minor of the age of fourteen,[9] fifteen,[10] sixteen,[11] seventeen,[12] eighteen,[13] nineteen,[14] or twenty.[15] As the court concluded in *State v. Carder* (Ohio 1965) *supra*, 210 N.E.2d 714, 719, after reviewing the facts surrounding the murder confession of a 16-year-old youth. 'Under this "totality of circumstances," for his statements to be inadmissible we would have to hold that any self-incrimination of a person under 18 years old is involuntary unless his parents or his attorney are present. We would also have to hold that such minor is not mature enough to make a voluntary confession or waive the presence of his parents or his lawyer during any conversation with the police. *This is not the law.*' (Italics added.)

Nor is it the law in California, where our courts uniformly follow the 'totality of circumstances' rule." (Fns. omitted.) (Pp. 378-379; 383-384.)

It appears that after having been told that he had a right to have an attorney but not his probation officer present,

the 16 year old minor, characterized by the trial court as not being a young naive individual with no experience with the courts, agreed to talk to the officer. We conclude that the "totality of the circumstances" affords sufficient "affirmative proof" of an intent to waive the privilege to support the trial court's conclusions in the instant case.

The orders appealed from are affirmed.

ALLPORT, J.

We concur:

COBEY, Acting P.J.

POTTER, J.